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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES

WASHINGTON, D.C. 20548

*[Protest Allegations Involve Product Acceptability and
Determination of Government's Minimum Needs]*

FILE: B-193763, B-195072 DATE: August 16, 1979

MATTER OF: Tyco DLG02155

DIGEST:

1. While procurement item description inappropriately identifies particular manufacturer's part number as included in specific National Stock Number (NSN), supplier of part properly included in NSN is not prejudiced thereby as solicitation provides for acceptance of parts which are shown to be functionally, physically, and electrically interchangeable with NSN part and agency considers substitute acceptable.
2. Determination of Government's minimum needs, method of accommodating them, and technical judgments on which they are based, are responsibility of contracting agency, and GAO will not question agency's decisions in those respects unless clearly shown to be unreasonable.
3. Enforcement and interpretation of criminal statutes is charged to Department of Justice rather than GAO.
4. GAO will not consider merits of issues that had been raised and disposed of by court of competent jurisdiction, and protest based on issues that are presently before court of competent jurisdiction is also dismissed where court has not expressed interest in receiving GAO decision.

AGC00378

Request for proposals (RFP) No. DLA 400-79-R-1776 was issued on March 23, 1979, by the Defense Logistics Agency (DLA) for 421 interrupter vibrators for use with aircraft fuel systems. The procurement item description (PID) identified the items as NSN 6130-00-504-0629, Midland Ross

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part number (P/N) 12C60-1. Clause C.16 of the RFP required firms offering to supply another manufacturer's part to show that the substitute part was either identical to or functionally, physically, and electrically interchangeable with the Midland Ross part.

Tyco had in the past supplied an acceptable vibrator, Tyco P/N 2500-407B, and therefore initially protested to our Office that the PID should also have identified Tyco's item as acceptable without further substantiation. In addition, Tyco contended that personnel at the procuring activity improperly used and disclosed Tyco's trade secrets and proprietary drawings in this and similar procurements in violation of certain criminal statutes and standards of conduct.

In response to the first point raised by the protest, DLA canceled the solicitation and issued RFP No. 400-79-R-2696 for the vibrators, in which Tyco P/N 2500-407B was included in the PID under the NSN. This solicitation included the same clause C.16 as was in the original RFP. Tyco then amended the protest to argue that Midland Ross P/N 12C60-1 is a solid state unit, whereas the cited NSN identifies a reed-type vibrator such as the Tyco item or Midland Ross P/N 12C60 (to which the NSN was assigned approximately 25 years ago). Tyco contends that classifying the solid state unit under that NSN represents a "misuse of the Government's controlling identification number." Tyco also suggests that only Tyco's product can meet the Government's needs. On those bases, Tyco argues that Midland Ross P/N 12C60-1 should not be considered for award.

We agree with Tyco to the extent that a solid state vibrator should not be procured by reference to an NSN that identifies only reed-type vibrators, and we are so advising DLA by separate letter. Nevertheless, we do not see how Tyco is prejudiced by such inconsistency in the instant procurement, since the record indicates that DLA considers Midland Ross P/N 12C60-1 to be interchangeable with a reed-type vibrator, and therefore would in any event be considered an acceptable item under clause C.16.

With respect to the above, the determination of the Government's minimum needs, the method of accommodating them and the technical judgments upon which those determinations are based, are primarily the responsibility of the contracting officials, who are most familiar with the conditions under which the supplies and services have been used or are to be used. On-Line Systems, Inc., B-193126, March 28, 1979, 79-1 CPD 208, at p. 7; METIS Corporation, 54 Comp. Gen. 612 (1975), 75-1 CPD 44. Therefore, our Office will not question agency decisions in those respects unless clearly shown to be unreasonable. Particle Data, Inc., B-179762, B-178718, May 15, 1974, 74-1 CPD 257. The mere fact that Tyco may dispute DLA's position on those matters does not invalidate it. Julian A. McDermott Corporation, B-191468, September 21, 1978, 78-2 CPD 214; Design Concepts, Inc., B-186880, December 22, 1976, 76-2 CPD 522. In this connection, we point out that the protester has the burden of affirmatively proving its case, Reliable Maintenance Service, Inc., -- Request for Reconsideration, B-185103, May 24, 1976, 76-1 CPD 337, and there is nothing in the record which would show the Midland Ross part was not an acceptable alternative. We therefore find no legal merit to this portion of the protest.

Concerning Tyco's allegations of improper conduct by the procuring officials, the enforcement and interpretation of criminal statutes is charged to the Department of Justice, rather than our Office. Polite Maintenance, Inc., B-194669, May 10, 1979, 79-1 CPD 335. In addition, the record shows that the same allegations have in part been raised a number of times in civil actions in the United States District Court for the Eastern District of Virginia, which to date has disposed of them in a manner adverse to Tyco, thereby foreclosing our consideration of those matters. Computer Products Unlimited, Inc., January 23, 1979, 79-1 CPD 44. Finally, the issue is now involved in Civil Action No. 78-0764-R brought by Tyco in that same forum. It is our policy not to decide matters where the material issues involved are before a court of competent jurisdiction unless the court expresses an interest in receiving our decision. 4 C.F.R. § 20.10 (1979); Robinson Associates, Inc., B-193056, November 24, 1978, 78-2 CPD 362. We also note that

Tyco has raised the issue in our Office a number of times previously and we have consistently advised the firm of our above-stated position. This portion of the protest is therefore dismissed.

We have reached this disposition without receiving a report from DLA on the merits of the protest. While it is our general practice to receive such a report before making our determination, where as here it is clear from the record provided by the protester that the protest is without legal merit, or it becomes evident that certain issues are otherwise not for our consideration, we will decide the matter on the basis of the protester's submission. Monarch Marking Systems, B-194257, March 28, 1979, 79-1 CPD 210.



Deputy Comptroller General
of the United States